UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E.I. DUPONT DE NEMOURS & CO.	)	
AND	)	Case No. 3-CA-096616
UNITED STEELWORKERS INTERNATIONAL UNION, AND ITS LOCAL UNION 6992.	)	

ANSWERING BRIEF OF RESPONDENT
E. I. DU PONT DE NEMOURS AND COMPANY

The General Counsel's brief focuses on the wrong agreement, claiming that the Union's waiver of the right to bargain over BeneFlex changes terminated in December 1993 with the expiration of parties' 1977 CBA. While acknowledging that the Union and DuPont entered into *a quid pro* agreement in 1991, whereby DuPont granted Union members eligibility to participate in BeneFlex "subject to all the terms and conditions of the [Plan]," the General Counsel fails to appreciate the legal significance of that agreement. The stipulated record shows that Union members' continued eligibility for BeneFlex benefits was inextricably intertwined with the Company's right to modify BeneFlex unilaterally for all DuPont employees nationwide. The undisputed record further shows – and more than 20 years of past practice has demonstrated – that neither Union's part of the bargain (eligibility for BeneFlex benefits) nor DuPont's part of the bargain (the right to make unilateral changes) expired at any time since the bargain was forged. Simply put, there is no support for the General Counsel's position that the Union's waiver expired prior to the implementation of the 2013 BeneFlex Changes at issue in this case.

The General Counsel's argument with regard to past practice fares no better. First, he claims that only changes made during contract hiatus periods are relevant to the parties' past practice, and that all unilateral changes implemented during contract periods are irrelevant. Second, he claims that there is no established past practice of DuPont "making unilateral BeneFlex changes during contract hiatus periods." Neither argument withstands scrutiny.

As the Board has recognized repeatedly, a consistent past practice of unilateral changes made during the term of a collective bargaining agreement can define the *status quo* that permits the continuation of the past practice following the contract's termination. Moreover, the stipulated record shows that DuPont's more than 20 year past practice of unilateral BeneFlex changes occurred during prolonged contract hiatus periods. Indeed, the General Counsel essentially concedes that there was a 14-year contract hiatus period running from the expiration of the parties' 1977 CBA in December 1993 to the execution of the 2008 CBA in April 2008. Indeed, the evidence shows that the parties were in contract status for only about 6 years during the period from 1992, when Union members began to participate in BeneFlex, and 2012, when the 2013 BeneFlex Changes were announced. Yet, the stipulated record shows that DuPont implemented unilateral changes to BeneFlex, similar in kind to the 2013 BeneFlex Changes at issue here, each and every year since 1992.

In short, none of the General Counsel's arguments has merit and the Board should hold the parties to the bargain they struck years ago: Union members should continue to be eligible to participate in the corporate-wide BeneFlex Plan and receive a wide array of valuable benefits just like other DuPont employees nationwide, but only if DuPont continues to retain the right to make changes for all Company employees.

I. The Union's Waiver Did Not Expire With the Termination of the 2008 CBA.

The General Counsel notes that the 2008 CBA contains a bargaining waiver that permitted DuPont to modify BeneFlex unilaterally, but argues that the Union's waiver expired on April 13, 2012, upon termination of the 2008 Agreement. (General Counsel Brief ("GC Brief") at 10). While the General Counsel is correct that the 2008 CBA contains a waiver, he focuses on the wrong agreement and the wrong waiver.

The undisputed evidence shows that the Union expressly waived its right to bargain over future BeneFlex changes in exchange for its members' participation in DuPont's corporate-wide BeneFlex Plan. The General Counsel concedes as much, acknowledging that the parties' 1991 negotiations resulted in an "[a]greement to grant eligibility to bargaining unit members 'subject to all terms and conditions of [BeneFlex].'" (*See* GC Brief at 3). Formed in 1991, the parties' *quid pro quo* agreement is the relevant "agreement," which contains the Union's express waiver, and which has remained in place, unchanged, for more than two decades.

There is no dispute that the Union knowingly, voluntarily, and expressly, waived its right to bargain over future BeneFlex changes as the *quid pro quo* – i.e., the "price of admission" – for participation in BeneFlex. (Stips. ¶ 19-20). The Union was aware that such a waiver was required to participate in DuPont's corporate-wide plans, as the Union concedes that when DuPont has created new benefits plans, such as BeneFlex in 1991, it has "offered the Union the opportunity to have its members participate in the benefit plans," upon the condition that such participation would be "subject to the terms of the benefit plans themselves." (*Id.* ¶ 11). DuPont provided the Union with the BeneFlex Plan language, the Union carefully scrutinized that language, and the Union specifically focused on, and raised questions about, the BeneFlex reservation of rights language. (*Id.* ¶ 11, 19). After fully considering the proposed *quid pro*

quo, the Union agreed to accept BeneFlex, subject to all of the terms of the Plan in 1991. (*Id.* ¶¶ 19-20). The BeneFlex reservation of rights language that the Union reviewed and agreed to has remained unchanged since 1991.

The 1991 Supplemental Agreement referenced by the General Counsel memorialized the parties' *quid quo pro* agreement and amended the 1977 CBA by adding BeneFlex to the list of benefit options available to Union workers at Yerkes. Specifically, the 1991 Supplemental Agreement modified the 1977 CBA to state:

> In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, the employees shall also receive benefits as provided by the COMPANY's Beneflex Flexible Benefits Plan, *subject to **all** terms and conditions of said plan.*

(*See* Jt. Exh. 9) (emphasis added). The parties' agreement, as reflected in the passage above, was that Union-represented employees at the Yerkes site could participate in BeneFlex, but only subject to all the terms of the Plan. That agreement – the key agreement at issue here – has never expired or been rescinded.

The General Counsel argues that the Union's waiver was not linked to Union member participation in BeneFlex, but contained some temporal limit tied to the term of the 1977 CBA. (GC Brief at 10). In support of that argument, the General Counsel claims that "[a]t no time" . . . did the Union agree to waive bargaining over the terms and conditions of BeneFlex beyond the term of the 1977 Agreement." (GC Brief at 3). The General Counsel's argument ignores the stipulated facts, his own admissions, and common sense.

As an initial matter, the General Counsel has admitted, as he must, that the parties' 1991 negotiations resulted in an "[a]agreement to grant eligibility to bargaining unit members 'subject to all terms and conditions of [BeneFlex].'" (GC Brief at 3). Moreover, the parties have stipulated that "the Union agreed to accept BeneFlex, subject to all of the terms of the Plan" in

October, 1991. (Stips. ¶¶ 19, 20, Jt. Exh. 9). Thus, the right of bargaining unit members to participate in BeneFlex is explicitly linked to the Union's agreement to the BeneFlex reservation of rights language. There is no record evidence, and the General Counsel has not cited any, to support the notion that the parties' *quid pro quo* agreement expired in 1993 with the expiration of the 1977 CBA.

The General Counsel's argument also defies common sense. If the parties' *quid pro quo* agreement expired in 1993 with the termination of the 1977 CBA as the General Counsel claims, then Union member eligibility to participate in BeneFlex should have expired in 1993 along with the Union's waiver. It did not. Union members at Yerkes have continued to participate in BeneFlex, subject to all the terms of the Plan, following the expiration of the 1977 CBA, during the term of the 2008 CBA, during the term of the current 2012 CBA, and during all of the hiatus periods between those contracts. And there is also no legal or evidentiary support for the General Counsel's alternative theory that Union employees remained eligible to participate in BeneFlex upon expiration of the 1977 CBA (or upon expiration of the 2008 CBA), subject to all of the terms of the Plan, except the Plan's reservation of rights provision.

The Board's decision in *Omaha World-Herald,* 357 NLRB No. 156 (2011), cited by the General Counsel does not support his position. Indeed, *Omaha* compels a finding of waiver here. In *Omaha*, the Board held that the employer's unilateral changes to its pension plan were lawful because the union had waived its right to bargain. The pension plan was not described in the parties' labor contract, but the Board recognized that the parties' rights could "only be understood by examining the plan's prior operation and the governing plan documents." (357 NLRB No. 156, Slip Op. at 2). As here, the "plan documents include[d] reservation of rights language, which expressly provides that the 'Employer shall have the right to amend the Plan,'"

and the parties' agreement that union members would participate in a company-wide plan covering both unit and non-unit employees. *(Id.)*. The Board recognized that the parties' "agreement could only be understood by reference to the plan documents and existing practice." *(Id.)*. The employer in *Omaha* had implemented only one prior unilateral change to the pension plan that was disadvantageous to union-members without any objection from the union. While the Board stated that the union's acquiescence to that prior change, without more, did not constitute a waiver, the Board found that the union had expressly waived its right to bargain over pension plan changes based on the parties' bargaining history and related benefit plan language. *(Id.,* Slip Op. at 3).

While the Board in *Omaha* found that the Union had not waived its right to bargain over changes to the employer's 401(k) plan, after expiration of the parties' collective bargaining agreement, the Board specifically noted that the union there could not "have been said to have acceded to the reservation of rights language in the plan documents" because the employer's "401(k) plan and its governing documents were created after the parties had negotiated their collective bargaining agreement." (*Id.* Slip Op. 4 and n.14). Here, by contrast, BeneFlex and its governing documents were created before the relevant collective bargaining agreements, and more importantly, the undisputed evidence shows that the Union reviewed, negotiated over, and agreed to the BeneFlex reservation of rights language without reservation.

II. The 2013 BeneFlex Changes Were Fully Consistent with Past Practice and, As Such, Did Not Alter the *Status Quo*

The General Counsel notes, correctly, that a past practice of unilateral changes becomes a term and condition of employment when such changes have "occurred with such frequency and regularity that employees could reasonably expect practice to continue." (GC Brief at 11). The General Counsel further acknowledges, as he must, that the 2013 BeneFlex Changes at issue here

were similar to prior changes announced and implemented by DuPont in prior years. (*Id.* at 8; *see also* Stips. ¶ 44). Despite those concessions, the General Counsel claims that: (1) BeneFlex changes made during contract periods are not relevant to the past practice analysis; and (2) there is no established past practice of unilateral changes during contract hiatus periods. (GC Brief at 12). As explained below, both of the General Counsel's arguments are contrary to applicable law and the stipulated facts.

A. Unilateral Changes Implemented During the Term of a Collective Bargaining Agreement Are Part of the *Status Quo.*

Relying on *E. I. DuPont de Nemours,* 355 NLRB No. 176 (2010) and a tortured reading of *Courier Journal*, 342 NLRB 1093 (1093), the General Counsel argues that a practice of unilateral changes made during the term of a contract is not relevant when analyzing changes made during the hiatus period between contracts. (GC Brief at 12). The General Counsel's position cannot be reconciled with controlling Board law.

First, the General Counsel fails to mention that the D.C. Circuit vacated the Board's decision in *E. I. DuPont de Nemours,* and, in doing so, specifically rejected, as inconsistent with prior Board law, the notion that a consistent past practice established during the term of a collective bargaining agreement cannot define the parties' *status quo* following contract expiration. *See E.I. DuPont de Nemours & Co. v. NLRB,* 682 F.3d 65, 69-70 (D.C. Cir. 2012).

Second, the General Counsel simply misreads *Courier-Journal.* In *Courier-Journal* the Board specifically held that "a unilateral change made pursuant to a longstanding practice is essentially a continuation of the *status quo* – not a violation of Section 8(a)(5)." 344 NLRB at 1093. There, as here, the parties had agreed that union employees would participate in an employer healthcare plan on the same terms as non-union employees, and that the employer had reserved "the right to modify or terminate" the healthcare plan. (*Id.* at 1093). Consistent with

those agreements, the employer implemented unilateral changes to employee medical coverage each year over a 10-year period. (*Id.*). In the 10 years prior to 2001, the employer made changes during only one contract hiatus. In 2001, the employer announced another set of heath care changes, following termination of the parties' labor contract. The Board dismissed the complaint, finding that the announced changes were consistent with the Company's 10-year past practice of making similar changes, the vast majority of which were implemented when labor contracts were in force. (*Id.* at 1094-1095). The Board's decision in *Courier-Journal* does not hinge on the existence of the benefit changes during the hiatus period; rather, the hiatus changes were simply mentioned in passing. (*Id.*)

Third, the General Counsel makes no attempt to distinguish the Board's decision in *Capitol Ford*, 343 NLRB 1058 (2004) or its more recent decision in *Finley Hospital*, 359 NLRB No. 9 (2012). In *Capitol Ford*, the Board specifically rejected the argument that the General Counsel advances here – that an established past practice is no longer valid simply because the contract provision that authorized the practice has expired:

> [T]he instant case involves the predecessor's practice of acting unilaterally with respect to bonuses. **The Respondent was privileged to continue that practice and did so in this case. Contrary to our colleague, the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice. The Respondent's reliance on its predecessor's past practice is not dependent on the continued existence of the predecessor's collective bargaining agreement.**

343 NLRB 1058, n.3 (2004) (emphasis added). The Board reaffirmed that position in *Finley Hospital*, holding that the employer was statutorily compelled to continue to provide merit raises during a hiatus period following expiration of a contract based on a past practice that had been established solely during the term of the expired contract. The General Counsel makes no

attempt to reconcile his argument with the Board's decisions in *Capitol Ford* or *Finley Hospital* or the D.C. Circuit's decision in *E.I. DuPont de Nemours*, likely because his argument cannot be reconciled with that controlling authority.

B. The Majority of DuPont's Unilateral Changes Occurred During Contract Periods

The General Counsel's argument that DuPont "does not have a practice of making unilateral change during contract hiatus periods" is flatly contradicted by the stipulated record and by the General Counsel's own admissions. (GC Brief at 12). As the General Counsel concedes, the 1977 CBA expired in 1993, two years after the Union agreed to BeneFlex. (GC Brief at 2). And the General Counsel also admits, as he must, that the parties did not enter into another collective bargaining agreement until the 2008 CBA, which was in force from April 2008 through April 2012. (GC Brief 2-3). Accordingly, there has been a collective bargaining agreement in place for only 6 of the 22 years since the Union agreed to BeneFlex. That, in turn, means that the parties have operated in a "contract hiatus period" for 14 of the 22 years that have passed since the parties entered into their *quid pro quo* agreement in 1991.

The stipulated record shows that DuPont made unilateral changes to BeneFlex, including changes to benefit premiums, co-pays, deductibles, eligibility criteria, levels of coverage and benefit and plan design, each and every year since 1992. (Stips. ¶ 38).[1] Thus, the General Counsel's claim that there is no past practice of unilateral changes during contract hiatus periods is remarkable to say the least.

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[1] As a result of the parties' 1997 Settlement, DuPont agreed to keep *medical* premiums static until an agreement or impasse was reached (which occurred in 2001 with DuPont's lawful declaration of impasse). DuPont did not agree to keep other aspects of BeneFlex unchanged, and the undisputed evidence shows that DuPont made numerous unilateral changes to BeneFlex during the period following the settlement. *See infra* pp 10-11.

The General Counsel also claims that there is no established past practice of BeneFlex changes because: (1) the parties actually negotiated over some of the changes; and (2) the Union objected to some of the Company's unilateral changes. (GC Brief at 12). Neither argument has factual or legal merit.

The undisputed record confirms that DuPont implemented a wide range of BeneFlex changes every year since 1992, including during long contract hiatus periods, the vast majority of which went unchallenged by the Union. The General Counsel's claim that the parties bargained over BeneFlex changes focuses solely on the parties' negotiations during the years 2002-2006 over the allocation of BeneFlex Medical premium increases ("premium cost split") to be borne by the Company and employees respectively.[2] (GC Brief at 13). While the parties certainly did negotiate over the premium cost split, as the General Counsel notes, he fails to acknowledge that the Company announced and unilaterally implemented a host of other BeneFlex changes without bargaining with, or objection from, the Union. Indeed, even during the 2002 to 2006 period cited by the General Counsel, during which the parties did bargain over the premium cost split, DuPont changed the total cost of BeneFlex premiums unilaterally without bargaining with or objection from the Union. As the parties obviously recognized, the "premium cost splitting" MOUs established the share of the premiums to be paid by the Company and employees, but did not modify or restrict DuPont's long established right to increase or decrease the premiums

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2 Pursuant to the terms of 2001 Offer, increases in medical premiums under BeneFlex were to be shared on a "50/50" basis. (*See* GC Brief at 6). Instead, DuPont offered the Union a more advantageous cost-splitting arrangement pursuant to which 70%, rather than 50%, of the cost increases would be borne by the Company. The Company could not have imposed the more advantageous cost-spit, without first bargaining with the Union, because the 50/50 cost split, like the Union's continued eligibility for BeneFlex benefits, subject to all the terms of the Plan, was the established *status quo*.

themselves. Indeed, DuPont changed BeneFlex medical premiums unilaterally several times during that period, including in 2003, 2004, 2006. (*See* Jt. Exhs. (3)(i), (k), (l) and (o)). DuPont also increased premiums in 2007, during the continuing hiatus prior to the 2008 CBA. (*See* Jt. Exh. 3(q) and (r)).

In addition to changes to BeneFlex medical premiums, DuPont made numerous other unilateral changes to BeneFlex, both during the 2002-2006 period and during other hiatus periods as well. Those unilateral changes included but were not limited to:

- Implementing design changes to medical coverage by introducing "network-based" managed care programs in 1994 (Jt. Exh. 3(a));
- Increasing premiums for Dental coverage in 1995 (Jt. Exh. 3(b));
- Changing approved providers in the Vision Plan network, reducing premiums for Vision coverage, and increasing premiums for Dental coverage in 1997 (Jt. Exh. 3(c));
- Adding a new Financial Planning option, changing Vision network providers, and increasing Dental premiums in 1998 (Jt. Exh. 3(d));
- Changing the benefit payout structure under Accidental Death Insurance Plan, adding coverage for oral contraceptives, reducing deductibles, and adjusting prescription copayment rates under BeneFlex Medical in 1999 (Jt. Exh. 3(e));
- Decreasing BeneFlex Employee Life Insurance rates in 2001 (Jt. Exh 3(f));
- Eliminating health care "Option L" and creating a new "Option U" with different terms under the BeneFlex Medical Plan and expanding coverage to include infertility treatment in 2003 (Jt. Exh. 3(k));
- Eliminating a Financial Planning option, adding a new Group Legal Plan and modifying the Dental Plan network in 2004 (Jt. Exh. (l))
- Modifying BeneFlex Vision Plan options, and amending BeneFlex eligibility criteria to include coverage of same-sex domestic partners in 2005 (Jt. Exhs. (m)-(n));

- Increasing medical, vision and accidental death premiums and decreasing employee life insurance premiums in 2006 (Jt. Exhs. (o)-(p));

- Decreasing Dental and Vision Plan premiums, introducing a BeneFlex Disease Management Program, and limiting stop-loss protection to "in-network" care under BeneFlex in 2007 (Jt. Exhs. (q) & (r)).

The General Counsel acknowledges that DuPont made unilateral changes BeneFlex in 2006 and 2007, implementing them in 2007 and 2008, without Union objection, during a period no contact existed. (GC Brief at 7-8).

In short, the evidence shows that during the 22 years since the Union agreed to BeneFlex, including the 14 years in which no contract was in place, the Company made repeated BeneFlex changes similar in kind to the 2013 Change at issue here. During that period, the Union only objected to a handful of BeneFlex changes, and only filed three unfair labor practices challenging DuPont's practice of making unilateral BeneFlex changes. Tacitly recognizing that the Union failed to object to the vast majority of past unilateral changes, the General Counsel argues that the Union did not waive its right to bargain "[e]ven if the Union did not object to prior unilateral BeneFlex changes." In so doing, the General Counsel conflates the concepts of waiver and past practice. As the Board has repeatedly recognized, the past practice analysis and waiver analysis are analytically distinct. *See Courier-Journal*, 342 NLRB at 1093-1094. *See also Capitol Ford,* 343 NLRB at 1058 n. 3 (noting that the employer could not rely on the waiver set forth in the expired labor contract, but finding that the employer's unilateral action was nonetheless lawful as a continuation of past practice); *Beverly Health & Rehabilitation Servs. Inc.,* 346 NLRB 1319, 1391 n.5 (2006) ("without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with the pattern of frequent exercise of its right to make unilateral changes during the term of the contract").

CONCLUSION

For all of the foregoing reasons, the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 8th day of September 2014, I caused a true and accurate copy of the foregoing Answering Brief of Respondent E.I. Du Pont De Nemours and Company to be served by electronic mail on the following parties:

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